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WHO IS WATCHING THE WATCHMAN?

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Bar must act forcefully in pursuit of justice

EDITORIAL BOARD

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Former Williamson County District Attorney Ken Anderson is expected to give his account this week of why his office failed to give Michael Morton and his lawyers evidence that could have acquitted Morton and likely spared the Georgetown husband and father nearly 25 years in prison.

Tragically, the evidence contains clues that might have prevented another killing in Travis County had Williamson County authorities been as zealous about investigating those clues as they were about convicting Morton for killing his wife, Christine Morton.

Anderson, now a state district judge in Georgetown, is not expected to speak publicly. He is giving his account in testimony taken under oath as part of an agreement that freed Michael Morton from prison recently. Morton wanted answers. The public does, too. Whether those answers will come in Anderson's testimony or in a separate investigation by the State Bar of Texas remains to be seen.

The 1987 Morton case, which collapsed over the past few months in the wake of DNA testing, was a high-profile case and another in which Anderson, the lead prosecutor at the time, got a conviction. But this time it was the wrong person. And fingers are being pointed at Anderson and his legal team for hiding evidence from Morton's defense lawyers.

Any miscarriage of justice is tragic, but there is a level of relief in cases of wrongful convictions that were caused by unintentional errors or mistakes.

The public can take a breath and feel the system corrected itself, however late and unfortunate.

As taxpayers, we financially compensate innocent people who suffer prison terms because mistakes were made. In some instances, district attorneys who prosecuted and judges who sentenced or oversaw those trials are rightly humbled and offer apologies.

But Morton's case denies us that comfort. We're learning that mistakes or unintentional errors were not the cause of an unjust outcome. Instead, we're seeing through court records the actions of an arrogant legal team that bent, broke or entirely discarded ethical rules to convict Morton.

Allegations regarding misconduct focus on Anderson and his trial assistant at the time, Mike Davis. But they also should encompass actions of the current Williamson County district attorney, John Bradley. For six years, Bradley waged a legal battle to prevent the very DNA testing of evidence that freed Morton and pointed to another culprit. Last week, Mark Alan Norwood, 57, was arrested in his Bastrop home and charged with the 1986 murder of Christine Morton.

Davis now is pointing a finger at Anderson.

American-Statesman writer Chuck Lindell reported last week that Davis, in his sworn testimony, described his former boss as a "control guy," who took part in every facet of a major case, from the investigation by law enforcement to the strategy used at trial.

Anderson, Davis said, would have determined what information had to be turned over to Michael Morton's lawyers before trial. The Round Rock lawyer added that he was "shocked" to discover this year that certain evidence had not been provided.

Davis said he was particularly troubled to learn that Morton's trial lawyers were not given evidence from an eyewitness to the crime, the Mortons' 3-year-old son. The boy described the attacker as a monster who was not his father.

We know now that Michael Morton's lawyers also were not given other key evidence, including information that Christine Morton's credit card was used days after her death and a check made out to her was cashed days after her death using an apparently forged signature.

The sworn testimony that makes public information regarding prosecutors' handling of the case is one part of accountability. The other, and the most important part, must come through the State Bar of Texas, which is conducting an investigation as to whether prosecutors violated state law by deliberately hiding key evidence from Morton's trial lawyer. The investigation will test whether the State Bar is up to the task of curbing wayward prosecutors.

Certainly, there are many district attorneys who abide by the rules and take seriously their duties to seek justice, even when it means losing a case. But there are those who have abused their authority, and they have become emboldened by a weak State Bar that has not acted forcefully enough to address misconduct in the legal profession.

The Texas legal system certainly needs the State Bar watchdog to bark. But a watchdog that is unwilling to bite cannot effectively protect the house.

Everything New Orleans

When the district attorney follows the rules, having faith will be easier: Jarvis DeBerry

Published: Sunday, December 04, 2011, 7:45 AM

By **Jarvis DeBerry**

Faith, according to a well-known biblical passage, is the evidence of things not seen. In New Orleans courtooms, though, what has sometimes gone unseen is that evidence which would aid the defense. Those prosecutorial shell games -- which have recently been decried by the U.S. Supreme Court -- have eroded faith in our system. They make a potential juror wonder if he'll be shown everything he ought to be shown if he's chosen to sit in judgment of another.

Times-Picayune archive

A potential juror enters a New Orleans courtroom wondering if he'll be shown everything essential to decide a case.

That was my concern when I was one of the 50 people called up to Judge Keva Landrum-Johnson's courtroom last month. A dozen of us would be asked to decide whether Henry "Boobie" Bruer shot Warren Smith at a Chef Menteur Highway apartment complex a year ago. I doubted the state would want me on a jury. I've written several columns recently about District Attorney Leon Cannizzaro, and none will be mistaken for praise. But if I were chosen, would I be able to take the evidence presented at face value? Or would I be left wondering if something essential to the case was being hidden?

My worry was moot in one sense: I wasn't chosen for Bruer's jury. It was prescient in another: Cannizzaro's office had indeed kept the defense in the dark about a deal prosecutors had made with Smith, the only eyewitness in the case.

It wasn't until the middle of the two-day trial that Cannizzaro's office revealed that it had been lenient on Smith in a drug case, allowing the multiple offender to serve probation instead of jail time. That deal was made in August -- and revealed after the trial began Nov. 8.

Cannizzaro's office acknowledged it the day after his assistant **Donna Andrieu was upbraided by both conservative and liberal justices on the Supreme Court**. She attempted to defend a decision made during the

Harry Connick administration to keep secret an eyewitness statement that contradicted his trial testimony. Justice Elena Kagan asked Andrieu why her office hadn't just conceded defeat. "Stop fighting as to whether it should be turned over," Justice Antonin Scalia told Andrieu. "Of course it should have been turned over."

Further weakening an already weak argument, Andrieu told the justices that "today we turn all this over." Just not right away. Bruer's trial began with his defense knowing nothing of the deal.

Read more

- **The deal that Leon Cannizzaro's office made with Warren Smith**

"Why did they give you a deal ... if you were a willing witness?" defense attorney Don Sauviac asked Smith. "It is what it is," Smith said. He'd have testified against Bruer anyway, he said, deal or no deal. But those who were chosen for the jury obviously thought it fishy that the victim was being rewarded for testifying against his alleged attacker. **They acquitted Bruer in 31 minutes**.

Initially Cannizzaro blamed Sauviac for not asking about a deal. "The defense attorney has to request it," he said, "and if he doesn't, we're not obligated to give it to him." Cannizzaro's spokeman Chris Bowman said the next week that the district attorney had "misunderstood the question."

What could Cannizzaro have thought he was being asked? What does the defense have to ask for that prosecutors would rather keep? Whatever it is, how does keeping it secret jibe with Andrieu's claim that "today we turn all this over?"

Cannizzaro **wrote a letter to the editor last Sunday** insisting that his office pursues its prosecutions honestly. But even the letter proclaiming his honesty raises eyebrows. Cannizzaro says Smith "received no special consideration related to his testimony in the Bruer case." But the multiple offender was allowed to plead as a first-time offender so long as he testified against Bruer. If that's not special consideration related to his testimony, what is?

"We are diligently working to restore people's faith in our system," he wrote.

Faith in the system is something I'd certainly like to have. But the evidence from the Connick administration -- and now evidence from Cannizzaro's -- suggests that it's a faith that's not yet warranted.

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Ohio death row inmate could be spared because of EP medical examiner's flawed testimony

By Andrew Welsh-Huggins / Associated Press

Posted: 05/18/2010 12:07:21 PM MDT

COLUMBUS, Ohio - The Ohio Parole Board today recommended clemency for a condemned inmate from Finneytown, Ohio, scheduled to die next month for strangling his live-in girlfriend, in a rare gesture of mercy from the panel.

The board ruled 4-3 in favor of a sentence of life without the possibility of parole for death row prisoner Richard Nields, scheduled to die June 10, according to a copy of the decision obtained by The Associated Press.

Nields, 59, killed Patricia Newsome during a 1997 argument in their Finneytown home.

In its decision, the board questioned the validity of medical evidence used at Nields' trial that helped support a death sentence. The ruling is only a recommendation for Gov. Ted Strickland, who has the final say.

Dr. Paul Shrode, then training in a medical fellowship at the Hamilton County coroner's office, testified at Nields' 1997 trial that bruising on the victim proved Nields beat his girlfriend, then returned 15 minutes later to strangle her to death. Shrode, 60, is now chief medical examiner of El Paso County.

But the deputy coroner who supervised Shrode in Ohio told the parole board Shrode's conclusions were not supported by science.

Dr. Robert Pfalzgraf, then a deputy coroner, said there was no scientific evidence to support how old the bruises on Newsome's body were.

Nields' attorneys argued that Shrode, then a recent medical school graduate who had not yet completed his coroner's fellowship, was not as experienced as Pfalzgraf

but was chosen by prosecutors over Pfalzgraf to testify at trial.

A message was left for Shrode seeking comment.

Shrode is under investigation by the Texas Medical Board over an allegation that he falsified his resume to obtain the medical examiner's position in El Paso County. He claimed to hold a law degree but does not.

The El Paso County Commissioners Court has delayed any action on Shrode pending the state board's investigation. Shrode is El Paso County's highest-paid government employee, making about $254,000 a year.

In Ohio, the board also cited concerns by the 6th

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U.S. Circuit Court of Appeals that Nields' death sentence barely fit the definition of capital punishment under Ohio law.

The board also cited a judge's dissent in a 2001 decision by the Ohio Supreme Court that upheld Nields' death sentence.

Justice Paul Pfeifer, who helped write Ohio's death penalty law as a state legislator in 1981, wrote that Nields' crime was not what lawmakers considered as a case eligible for the death penalty when creating the law.

"Members give significant weight to Justice Pfeifer's opinion in that he was a member of the Ohio General Assembly in 1981, and was one of the leading forces who helped write and enact Ohio's current death penalty statute," the ruling said.

Three members voted against clemency, pointing out that Nields had often threatened his girlfriend in the past. They also said the fact that he took Newsome's car, money and travelers' checks constituted aggravated robbery, an additional crime that made Nields eligible for death.

The dissenting board members also said Nields had a history of violence against women and tried to mislead police as they investigated Newsome's death.

"Given all of these facts, we do not believe that the outcome of the case would have been any different had the court and jury heard more reliable medical testimony," the dissenting members said.

Strickland, a Democrat, last year rejected a ruling by the board to grant clemency to a condemned inmate whose coconspirators did not receive death sentences.

Messages were left for Strickland and the Hamilton County prosecutor's office, which argued against clemency.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VAN DE KAMP ET AL. *v.* GOLDSTEIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–854. Argued November 5, 2008—Decided January 26, 2009

Respondent Goldstein was released from a California prison after he filed a successful federal habeas petition alleging that his murder conviction depended, in critical part, on the false testimony of a jailhouse informant (Fink), who had received reduced sentences for providing prosecutors with favorable testimony in other cases; that prosecutors knew, but failed to give his attorney, this potential impeachment information; and that, among other things, that failure had led to his erroneous conviction. Once released, Goldstein filed this suit under 42 U. S. C. §1983, asserting the prosecution violated its constitutional duty to communicate impeachment information, see *Giglio* v. *United States*, 405 U. S. 150, 154, due to the failure of petitioners, supervisory prosecutors, to properly train or supervise prosecutors or to establish an information system containing potential impeachment material about informants. Claiming absolute immunity, petitioners asked the District Court to dismiss the complaint, but the court declined, finding that the conduct was "administrative," not "prosecutorial," and hence fell outside the scope of an absolute immunity claim. The Ninth Circuit, on interlocutory appeal, affirmed.

Held: Petitioners are entitled to absolute immunity in respect to Goldstein's supervision, training, and information-system management claims. Pp. 3–12.

(a) Prosecutors are absolutely immune from liability in §1983 suits brought against prosecutorial actions that are "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, 424 U. S. 409, 428, 430, because of "concern that harassment by unfounded litigation" could both "cause a deflection of the prosecutor's energies from his public duties" and lead him to "shade his decisions instead of exercising the independence of judgment required by his

Syllabus

public trust," *id.*, at 423. However, absolute immunity may not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in, say, investigative or administrative tasks. *Id.*, at 431, n. 33. To decide whether absolute immunity attaches to a particular prosecutorial activity, one must take account of *Imbler*'s "functional" considerations. The fact that one constitutional duty in *Imbler* was positive (the duty to supply "information relevant to the defense") rather than negative (the duty not to "use . . . perjured testimony") was not critical to the finding of absolute immunity. Pp. 3–6.

(b) Although Goldstein challenges administrative procedures, they are procedures that are directly connected with a trial's conduct. A prosecutor's error in a specific criminal trial constitutes an essential element of the plaintiff's claim. The obligations here are thus unlike administrative duties concerning, *e.g.*, workplace hiring. Moreover, they necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in training, supervision, or information-system management. Given these features, absolute immunity must follow. Pp. 6–12.

(1) Had Goldstein brought a suit directly attacking supervisory prosecutors' actions related to an individual trial, instead of one involving administration, all the prosecutors would have enjoyed absolute immunity under *Imbler*. Their behavior, individually or separately, would have involved "[p]reparation . . . for . . . trial," 424 U. S., at 431, n. 33, and would have been "intimately associated with the judicial phase of the criminal process," *id.*, at 430. The only difference between *Imbler* and the hypothetical, *i.e.*, that a supervisor or colleague might be liable *instead of* the trial prosecutor, is not critical. Pp. 7–8.

(2) Just as supervisory prosecutors are immune in a suit directly attacking their actions in an individual trial, they are immune here. The fact that the office's *general* supervision and training methods are at issue is not a critical difference for present purposes. The relevant management tasks concern how and when to make impeachment information available at trial, and, thus, are directly connected with a prosecutor's basic trial advocacy duties. In terms of *Imbler*'s functional concerns, a suit claiming that a supervisor made a mistake directly related to a particular trial and one claiming that a supervisor trained and supervised inadequately seem very much alike. The type of "faulty training" claim here rests in part on a consequent error by an individual prosecutor in the midst of trial. If, as *Imbler* says, the threat of damages liability for such an error could lead a trial prosecutor to take account of that risk when making trial-related decisions, so, too, could the threat of more widespread liabil-

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ity throughout the office lead both that prosecutor and other office prosecutors to take account of such a risk. Because better training or supervision might prevent most prosecutorial errors at trial, permission to bring suit here would grant criminal defendants permission to bring claims for other trial-related training or supervisory failings. Further, such suits could "pose substantial danger of liability even to the honest prosecutor." *Imbler*, 425 U. S., at 425. And defending prosecutorial decisions, often years later, could impose "unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.*, at 425–426. Permitting this suit to go forward would also create practical anomalies. A trial prosecutor would remain immune for intentional misconduct, while her supervisor might be liable for negligent training or supervision. And the ease with which a plaintiff could restyle a complaint charging trial failure to one charging a training or supervision failure would eviscerate *Imbler*. Pp. 8–11.

(3) The differences between an information management system and training or supervision do not require a different outcome, for the critical element of any information system is the information it contains. Deciding what to include and what not to include is little different from making similar decisions regarding training, for it requires knowledge of the law. Moreover, were this claim allowed, a court would have to review the office's legal judgments, not simply about *whether* to have an information system but also about *what kind* of system is appropriate, and whether an appropriate system would have included *Giglio*-related information *about one particular kind of informant*. Such decisions—whether made before or during trial—are "intimately associated with the judicial phase of the criminal process," *Imbler*, *supra*, at 430, and all *Imbler*'s functional considerations apply. Pp. 11–12.

481 F. 3d 1170, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 07–854

JOHN VAN DE KAMP, ET AL., PETITIONERS *v.*
THOMAS LEE GOLDSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 26, 2009]

JUSTICE BREYER delivered the opinion of the Court.

We here consider the scope of a prosecutor's absolute immunity from claims asserted under Rev. Stat. §1979, 42 U. S. C. §1983. See *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). We ask whether that immunity extends to claims that the prosecution failed to disclose impeachment material, see *Giglio* v. *United States*, 405 U. S. 150 (1972), due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants. We conclude that a prosecutor's absolute immunity extends to all these claims.

I

In 1998, respondent Thomas Goldstein (then a prisoner) filed a habeas corpus action in the Federal District Court for the Central District of California. He claimed that in 1980 he was convicted of murder; that his conviction depended in critical part upon the testimony of Edward Floyd Fink, a jailhouse informant; that Fink's testimony was unreliable, indeed false; that Fink had previously

received reduced sentences for providing prosecutors with favorable testimony in other cases; that at least some prosecutors in the Los Angeles County District Attorney's Office knew about the favorable treatment; that the office had not provided Goldstein's attorney with that information; and that, among other things, the prosecution's failure to provide Goldstein's attorney with this potential impeachment information had led to his erroneous conviction. *Goldstein* v. *Long Beach*, 481 F. 3d 1170, 1171–1172 (CA9 2007).

After an evidentiary hearing the District Court agreed with Goldstein that Fink had not been truthful and that if the prosecution had told Goldstein's lawyer that Fink had received prior rewards in return for favorable testimony it might have made a difference. The court ordered the State either to grant Goldstein a new trial or to release him. The Court of Appeals affirmed the District Court's determination. And the State decided that, rather than retry Goldstein (who had already served 24 years of his sentence), it would release him. App. 54–55, 59–60.

Upon his release Goldstein filed this §1983 action against petitioners, the former Los Angeles County district attorney and chief deputy district attorney. Goldstein's complaint (which for present purposes we take as accurate) asserts in relevant part that the prosecution's failure to communicate to his attorney the facts about Fink's earlier testimony-related rewards violated the prosecution's constitutional duty to "insure communication of all relevant information on each case [including agreements made with informants] to every lawyer who deals with it." *Giglio*, *supra,* at 154. Moreover, it alleges that this failure resulted from the failure of petitioners (the office's chief supervisory attorneys) adequately to train and to supervise the prosecutors who worked for them as well as their failure to establish an information system about informants. And it asks for damages based upon

these training, supervision, and information-system related failings.

Petitioners, claiming absolute immunity from such a §1983 action, asked the District Court to dismiss the complaint. See *Imbler, supra.* The District Court denied the motion to dismiss on the ground that the conduct asserted amounted to "administrative," not "prosecutorial," conduct; hence it fell outside the scope of the prosecutor's absolute immunity to §1983 claims. The Ninth Circuit, considering petitioners' claim on an interlocutory appeal, affirmed the District Court's "no immunity" determination. We now review the Ninth Circuit's decision, and we reverse its determination.

II

A half-century ago Chief Judge Learned Hand explained that a prosecutor's absolute immunity reflects "a balance" of "evils." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949). "[I]t has been thought in the end better," he said, "to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Ibid.* In *Imbler, supra*, this Court considered prosecutorial actions that are "intimately associated with the judicial phase of the criminal process." *Id.*, at 430. And, referring to Chief Judge Hand's views, it held that prosecutors are absolutely immune from liability in §1983 lawsuits brought under such circumstances. *Id.*, at 428.

The §1983 action at issue was that of a prisoner freed on a writ of habeas corpus who subsequently sought damages from his former prosecutor. His action, like the action now before us, tracked the claims that a federal court had found valid when granting his habeas corpus petition. In particular, the prisoner claimed that the trial prosecutor had permitted a fingerprint expert to give false testimony, that the prosecutor was responsible for the expert's having

suppressed important evidence, and that the prosecutor had introduced a misleading artist's sketch into evidence. *Id.*, at 416.

In concluding that the prosecutor was absolutely immune, the Court pointed out that legislators have long "enjoyed absolute immunity for their official actions," *id.*, at 417; that the common law granted immunity to "judges and . . . jurors acting within the scope of their duties," *id.*, at 423, and that the law had also granted prosecutors absolute immunity from common-law tort actions, say, those underlying a "decision to initiate a prosecution," *id.*, at 421. The Court then held that the "same considerations of public policy that underlie" a prosecutor's common-law immunity "countenance absolute immunity under §1983." *Id.*, at 424. Those considerations, the Court said, arise out of the general common-law "concern that harassment by unfounded litigation" could both "cause a deflection of the prosecutor's energies from his public duties" and also lead the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.*, at 423.

Where §1983 actions are at issue, the Court said, both sets of concerns are present and serious. The "public trust of the prosecutor's office would suffer" were the prosecutor to have in mind his "own potential" damages "liability" when making prosecutorial decisions—as he might well were he subject to §1983 liability. *Id.*, at 424. This is no small concern, given the frequency with which criminal defendants bring such suits, *id.*, at 425 ("[A] defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate"), and the "substantial danger of liability even to the honest prosecutor" that such suits pose when they survive pretrial dismissal, *ibid.*; see also *ibid.* (complex, close, fair-trial questions "often would require a virtual retrial of the criminal offense in a new

forum, and the resolution of some technical issues by the lay jury"). A "prosecutor," the Court noted, "inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.*, at 425–426. The Court thus rejected the idea of applying the less-than-absolute "qualified immunity" that the law accords to other "executive or administrative officials," noting that the "honest prosecutor would face greater difficulty" than would those officials "in meeting the standards of qualified immunity." *Id.*, at 425. Accordingly, the immunity that the law grants prosecutors is "absolute." *Id.*, at 424.

The Court made clear that absolute immunity may not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in other tasks, say, investigative or administrative tasks. *Id.*, at 431, n. 33. To decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of the "functional" considerations discussed above. See *Burns* v. *Reed*, 500 U. S. 478, 486 (1991) (collecting cases applying "functional approach" to immunity); *Kalina* v. *Fletcher*, 522 U. S. 118, 127, 130 (1997). In *Imbler*, the Court concluded that the "reasons for absolute immunity appl[ied] with full force" to the conduct at issue because it was "intimately associated with the judicial phase of the criminal process." 424 U. S., at 430. The fact that one constitutional duty at issue was a positive duty (the duty to supply "information relevant to the defense") rather than a negative duty (the duty not to "use . . . perjured testimony") made no difference. After all, a plaintiff can often transform a positive into a negative duty simply by reframing the pleadings; in either case, a constitutional violation is at issue. *Id.*, at 431, n. 34.

Finally, the Court specifically reserved the question whether or when "similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator . . . rather than that of advocate." *Id.*, at 430–431. It said that "[d]rawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them." *Id.*, at 431, n. 33.

In the years since *Imbler*, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, *Burns, supra,* at 492, or appears in court to present evidence in support of a search warrant application, *Kalina, supra,* at 126. We have held that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, see *Burns, supra,* at 496, when the prosecutor makes statements to the press, *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 277 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina, supra,* at 132 (SCALIA, J., concurring). This case, unlike these earlier cases, requires us to consider how immunity applies where a prosecutor is engaged in certain administrative activities.

III

Goldstein claims that the district attorney and his chief assistant violated their constitutional obligation to provide his attorney with impeachment-related information, see *Giglio,* 405 U. S. 150, because, as the Court of Appeals wrote, they failed "to adequately train and supervise deputy district attorneys on that subject," 481 F. 3d, at 1176, and because, as Goldstein's complaint adds, they "failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information." App. 45. We agree

with Goldstein that, in making these claims, he attacks the office's administrative procedures. We are also willing to assume with Goldstein, but purely for argument's sake, that *Giglio* imposes certain obligations as to training, supervision, or information-system management.

Even so, we conclude that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.

A

We reach this conclusion by initially considering a hypothetical case that involves supervisory or other office prosecutors but does not involve administration. Suppose that Goldstein had brought such a case, seeking damages not only from the trial prosecutor but also from a supervisory prosecutor or from the trial prosecutor's colleagues—all on the ground that they should have found and turned

over the impeachment material about Fink. *Imbler* makes clear that all these prosecutors would enjoy absolute immunity from such a suit. The prosecutors' behavior, taken individually or separately, would involve "[p]reparation . . . for . . . trial," 424 U. S., at 431, n. 33, and would be "intimately associated with the judicial phase of the criminal process" because it concerned the evidence presented at trial. *Id.*, at 430. And all of the considerations that this Court found to militate in favor of absolute immunity in *Imbler* would militate in favor of immunity in such a case.

The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages *instead of* the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical. Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could alleviate *Imbler's* basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks. Moreover, this Court has pointed out that "it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance." *Kalina*, 522 U. S., at 125. Thus, we must assume that the prosecutors in our hypothetical suit would enjoy absolute immunity.

B

Once we determine that supervisory prosecutors are immune in a suit directly attacking their actions related to an individual trial, we must find they are similarly immune in the case before us. We agree with the Court of

Appeals that the office's *general* methods of supervision and training are at issue here, but we do not agree that that difference is critical for present purposes. That difference does not preclude an intimate connection between prosecutorial activity and the trial process. The management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties. And, in terms of *Imbler*'s functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike.

That is true, in part, for the practical reason that it will often prove difficult to draw a line between *general* office supervision or office training (say, related to *Giglio*) and *specific* supervision or training related to a particular case. To permit claims based upon the former is almost inevitably to permit the bringing of claims that include the latter. It is also true because one cannot easily distinguish, for immunity purposes, between claims based upon training or supervisory failures related to *Giglio* and similar claims related to other constitutional matters (obligations under *Brady* v. *Maryland*, 373 U. S. 83 (1963), for example). And that being so, every consideration that *Imbler* mentions militates in favor of immunity.

As we have said, the type of "faulty training" claim at issue here rests in necessary part upon a consequent error by an individual prosecutor in the midst of trial, namely, the plaintiff's trial. If, as *Imbler* says, the threat of damages liability for such an error could lead a trial prosecutor to take account of that risk when making trial-related decisions, so, too, could the threat of more widespread liability throughout the office (ultimately traceable to that trial error) lead both that prosecutor and other office

prosecutors as well to take account of such a risk. Indeed, members of a large prosecutorial office, when making prosecutorial decisions, could have in mind the "consequences in terms of" damages liability whether they are making general decisions about supervising or training or whether they are making individual trial-related decisions. *Imbler,* 424 U. S., at 424.

Moreover, because better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings. Cf. *Imbler, supra.* Further, given the complexity of the constitutional issues, inadequate training and supervision suits could, as in *Imbler*, "pose substantial danger of liability even to the honest prosecutor." *Id.*, at 425. Finally, as *Imbler* pointed out, defending prosecutorial decisions, often years after they were made, could impose "unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.*, at 425–426.

At the same time, to permit this suit to go forward would create practical anomalies. A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office-wide supervision and training, would not. Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler.*

We conclude that the very reasons that led this Court in *Imbler* to find absolute immunity require a similar finding

in this case. We recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits; but the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here.

C

We treat separately Goldstein's claim that the Los Angeles County District Attorney's Office should have established a system that would have permitted prosecutors "handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information." App. 45. We do so because Goldstein argues that the creation of an information management system is a more purely administrative task, less closely related to the "judicial phase of the criminal process," *Imbler*, *supra,* at 430, than are supervisory or training tasks. He adds that technically qualified individuals other than prosecutors could create such a system and that they could do so prior to the initiation of criminal proceedings.

In our view, however, these differences do not require a different outcome. The critical element of any information system is the information it contains. Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training. Again, determining the criteria for inclusion or exclusion requires knowledge of the law.

Moreover, the absence of an information system is relevant here if, and only if, a proper system would have included information about the informant Fink. Thus, were this claim allowed, a court would have to review the office's legal judgments, not simply about *whether* to have an information system but also about *what kind* of system is appropriate, and whether an appropriate system would

have included *Giglio*-related information *about one particular kind of trial informant.* Such decisions—whether made prior to or during a particular trial—are "intimately associated with the judicial phase of the criminal process." *Imbler*, *supra,* at 430; see *Burns*, 500 U. S., at 486. And, for the reasons set out above, all *Imbler's* functional considerations (and the anomalies we mentioned earlier, *supra*, at 10) apply here as well.

We recognize that sometimes it would be easy for a court to determine that an office's decision about an information system was inadequate. Suppose, for example, the office had no system at all. But the same could be said of a prosecutor's trial error. Immunity does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake. And, as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision-making process. Such is true of the kinds of claims before us, to all of which *Imbler's* functional considerations apply. Consequently, where a §1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.

* * *

For these reasons we conclude that petitioners are entitled to absolute immunity in respect to Goldstein's claims that their supervision, training, or information-system management was constitutionally inadequate. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE DALLAS MORNING NEWS

March 13, 1994, Sunday, HOME FINAL EDITION

HEADLINE: Erdmann case hurt prosecutors;
2 incumbents who backed pathologist lose re-election bids

BYLINE: Lee Hancock

BODY:

Two West Texas prosecutors who staunchly defended discredited pathologist Ralph Erdmann, even indicting his critics, were swept out of office last week in Lubbock and Randall counties.

The defeats for Lubbock County District Attorney Travis Ware and Randall County District Attorney Randy Sherrod cap a rough-and-tumble brawl fought out in state and federal courts across the Panhandle.

In comments last week, Mr. Ware, a two-term Republican incumbent, agreed that the adverse publicity he received from the Erdmann case hurt him at the polls. Mr. Sherrod, a Republican who has served 19 years as district attorney, did not return telephone calls.

Observers in both counties say the elections became - at least in part - a referendum on the Erdmann case, which began in April 1992 when defense lawyers presented evidence of Mr. Erdmann's long history of incompetence and misdeeds in a Randall County capital murder case.

In September 1992, Mr. Erdmann surrendered his medical license and pleaded guilty to seven state felonies tied to falsified evidence and botched autopsies.

After tumultuous hearings in the Randall County murder case, two Lubbock police officers whose testimony suggested that the prosecutors were covering up the pathologist's wrongdoing, and a defense lawyer who orchestrated the hearings, were indicted on state charges ranging from witness tampering to perjury.

In a rare federal intervention, a U.S. district judge in Amarillo blocked the state prosecutions in March 1993 after the police and the lawyer, Millard Farmer of Atlanta, filed a federal racketeering and civil rights lawsuit. The suit was settled in July for $ 300,000 and an agreement by the two prosecutors to dismiss the indictments.

But even then, the Erdmann scandal refused to die.

"I think that it had a substantial impact on the election," said

Bill Sowder, a former Lubbock County assistant district attorney who got 55 percent of the vote to defeat Mr. Ware, who had 27 percent, in the Republican primary and faces Democrat Clay Abbott in the November general election. "He would have been difficult to beat until this Erdmann stuff came up."

"I think that there's so many explanations for what happened that I don't know where to begin enumerating the possibilities," said Mr. Ware, who ran unopposed in 1990.

"I suspect that had the Erdmann controversy never been blown out of proportion by the news media, that there would have been no opponent this time either because without that there would have been no issue for my opponents," he said.

Jane Anne Stinnitt, a Lubbock pollster, said Mr. Ware also was hurt by controversy over a repeat felon who was offered a lenient sentence after giving questionable testimony in a murder case. The uproar over a probation sentence given to one of Mr. Ware's assistants after he struck and killed a pedestrian while driving drunk also prompted debate.

"All of these things hurt," she said.

In Randall County, observers say, Mr. Sherrod was also damaged by voters' ire over his long-standing feud with the county commissioners. His opponent in the Republican primary, Potter County Assistant District Attorney James Farren, outpolled him more than 2-to-1.

"Erdmann was another brick in the pile for the voters. They could've run Daffy Duck against Sherrod and won," said Mr. Farren, who faces Democrat Bill Rivers in the general election.

"When a person with that much power brings indictments against police officers and attorneys that a federal district judge concludes were retaliatory, in bad faith and violated constitutional rights, that's an indication that things are way out of line."

Even after the elections, fallout from the Erdmann case continues. A lawsuit brought against Lubbock County in connection with a botched Erdmann autopsy is scheduled for trial in September.

A former Lubbock newspaper reporter has sued Mr. Ware, alleging the prosecutor made slanderous statements that resulted in the reporter being barred from covering the district attorney's office or the Erdmann case.

The county and Mr. Ware have denied wrongdoing.

Mr. Ware is under investigation by the Texas Bar Association for alleged ethical violations related to the indictment of one of the Lubbock police officers, Sgt. Bill Hubbard.

One confidential bar hearing was held last month, and another is scheduled within the next two months. Mr. Ware has denied wrongdoing.

Sgt. Hubbard declined to discuss the bar inquiry. But he said the election results are "just a stamp of approval from the public that they understood what was going on, what Travis Ware and Randy Sherrod were doing, and the voters said enough. I'd like to think Ralph Erdmann claimed two prosecutors this week."

Staff writer Lee Hancock covers West Texas for The Dallas Morning News.

dallasnews.com
The Dallas Morning News

Editorial: Bad prosecutors should face prison

06:41 AM CDT on Tuesday, May 6, 2008

Craig Watkins has had a few misses amid many hits in his first term as Dallas County district attorney, but it's hard to argue with his there-oughta-be-a-law sentiment on prosecutorial misconduct.

Mr. Watkins has pushed as hard to free the innocent as he has to convict the guilty. In that spirit, he now wants Texas to increase punishments - up to and including prison time - for prosecutors who intentionally withhold evidence from defendants.

Today, Texas law allows cash compensation to those wrongfully convicted but has no criminal sanctions for prosecutors who intentionally commit "Brady violations." The term stems from a 1963 U.S. Supreme Court ruling in Brady vs. Maryland that held that defendants' constitutional rights are violated if prosecutors intentionally or accidentally withhold evidence favorable to the defense.

A sanction from the State Bar of Texas is the worst penalty a prosecutor currently can expect, and such instances are so rare as to be noteworthy when they occur.

Even the most egregious recent example of U.S. prosecutorial misconduct - Durham County, N.C., District Attorney Mike Nifong and the so-called Duke lacrosse case - resulted in only a day in jail, a fine and disbarment. If that sounds stiff, consider the potential life ruination from his attempts to prosecute three college students on rape charges he knew to be false.

Few cases are as heinous or as obvious. Ferreting out this type of injustice is far from as clear-cut as a DNA exoneration. It can be years or even decades

before legal teams can dig up the evidence needed to bring such a charge.

If time – in effect, a statute of limitations – is a potential obstacle, Mr. Watkins also knows that degree is another. Every bit of evidence, from a witness to a document to a fiber found at a crime scene, carries a different weight. This must be considered in any new law.

Since he's not a state legislator, Mr. Watkins needs someone to carry a bill for him in Austin. We would think he would have the support of the vast majority of his DA colleagues. They know as well as he does that any prosecutor who cheats the system and cuts corners makes all of them look bad.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 28, 2009

Charles R. Fulbruge III
Clerk

No. 08-20220

ERIK ADAM IBARRA; ET AL

Plaintiffs

v.

MARY BAKER; FRANK E SANDERS

Defendants - Appellants

- -

SEAN CARLOS IBARRA

Plaintiff - Appellee

v.

HARRIS COUNTY TEXAS; ET AL

Defendants

MARY BAKER; FRANK E SANDERS

Appellants

08-20220
08-20276

Consolidated with
No. 08-20276

ERIK ADAM IBARRA

Plaintiff

v.

HARRIS COUNTY TEXAS; ET AL

Defendants

v.

MR SCOTT A DURFEE

Respondent - Appellant

- -

SEAN CARLOS IBARRA

Plaintiff

v.

HARRIS COUNTY TEXAS; ET AL

Defendants

v.

SCOTT A DURFEE

Appellant

08-20220
08-20276

Appeals from the United States District Court
for the Southern District of Texas

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

These two appeals are from findings of attorney misconduct.

Mary Baker, Scott Durfee, and Frank Sanders represented Harris County, Texas, and several of its law enforcement officers in a 42 U.S.C. § 1983 action. The district court found that Baker and Sanders improperly coached defense witnesses, gave or abided false testimony, and vexatiously released a plaintiff's medical records. During the same § 1983 litigation, but in a completely separate incident, Durfee's client deleted approximately 2,500 emails that were under subpoena. The district court found Durfee partially to blame for the emails' deletion. It held Durfee in contempt and sanctioned him for attorney misconduct. It imposed monetary sanctions against all three attorneys, and it disqualified Baker and Sanders from further representation in the case.

The underlying § 1983 litigation has settled, and the attorneys' monetary sanctions have been paid or considered paid. Baker, Sanders, and Durfee nevertheless appeal from the findings of attorney misconduct, asserting that the findings are erroneous and will mar each attorney's professional reputation.

The attorneys' concern about their reputation suffices to confer Article III jurisdiction. Durfee's appeal is meritorious, and we vacate all findings that he committed misconduct. We also vacate the findings that Baker and Sanders gave or abided false testimony, but we affirm the findings that Baker and Sanders improperly coached witnesses.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

We begin by addressing our jurisdiction over these appeals. Though the attorneys' monetary sanctions have been paid or considered paid, their appeals are not moot. *See Fleming & Assocs. v. Newby & Tittle*, 529 F.3d 631, 640 (5th Cir. 2008) ("Any non-monetary portion of the sanctions not rendered moot by settlement is appealable for its residual reputational effects on the attorney."); *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 226 (5th Cir. 1998) ("This appeal is not moot because the [temporary] disbarment on the attorney's record may affect her status as a member of the bar and have other collateral consequences."); *Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997) ("[T]he importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct."). We will proceed to consider the appeals' merit.

II.

We apply the same standard of review to both appeals. We review the legal standard under which the district court sanctioned the attorneys *de novo*, and we review the district court's factual findings of attorney misconduct only for clear error. "The clear error standard of review 'precludes reversal of a district court's findings unless [the court] is left with a definite and firm conviction that a mistake has been committed.'" *Houston Indep. School Dist. v. V.P. ex rel. Juan P.*, 566 F.3d 459, 465-66 (5th Cir. 2009) (quoting *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 213 (5th Cir. 2006)).

The remainder of this opinion proceeds as follows. We will first set out the facts common to both appeals.[1] We will next consider Baker's and Sanders's

[1] Our scope of review affects how we will recount the history of these appeals. As a court of review, we do not search the record for information that "might possibly support" the district

appeal, setting out the facts relevant only to that appeal and then assessing the validity of the findings that Baker and Sanders committed attorney misconduct. Finally, we will consider Durfee's appeal, setting out the facts relevant only to that appeal and then assessing the validity of the findings that Durfee committed attorney misconduct.

III.

Both appeals arise from the same underlying litigation, which originated as follows.

Sean Ibarra and Erik Ibarra resided at 2907 Shady Park Drive, Houston, Texas. In January 2002, Harris County law enforcement officers executed a search and arrest warrant at the residence next door, 2911 Shady Park Drive. At least one plain-clothed officer was present at the scene.[2] While the officers were executing the search warrant, Sean Ibarra stepped outside his residence and, standing from 2907 Shady Park Drive, began photographing 2911 Shady Park Drive.

Deputy Preston Foose noticed Sean taking photographs. Foose asked Sean to cease, and he also asked Sean to give him the camera. Sean refused and, according to Foose, fled toward his residence. Foose followed, and Deputy Dan Shattuck also gave chase.

Foose and Shattuck caught up to Sean at his residence. An altercation ensued. Madalyn Valdez, who also resided at 2907 Shady Park Drive, joined in

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court's imposition of sanctions. *Sheets v. Yamaha Motors Corp.*, 849 F.2d 179, 185 (5th Cir. 1988). Instead, we confine our attention to that portion of the record upon which the district court relied. *Id.* We will thus highlight only those portions of the record that the district court either mentioned or obviously relied upon in finding that Baker, Sanders, and Durfee committed attorney misconduct.

[2] The litigants have referred to one or more officers being "undercover." The record reveals that "[t]he undercover officers were wearing jackets with the word 'POLICE' on the jacket that identified them as police officers." We will refer to these officers as plain-clothed.

the altercation. Erik Ibarra also participated briefly, then left and retrieved a video recorder. He began to record the altercation when he returned.

More officers arrived, and they gained control of the situation. The officers seized Sean's camera and Erik's video recorder. They arrested Erik for resisting arrest, Sean for evading arrest and resisting arrest, and Valdez for resisting arrest and assault. The district attorney's office prosecuted all three.

Sean and Erik were acquitted. They then filed separate civil actions against various Harris County defendants.[3] The Ibarras alleged, *inter alia*, that the defendants had violated their constitutional rights by arresting them and seizing their belongings.

IV.

Mindful of these facts, we turn to consider Baker's and Sanders's appeal.

A.

Harris County Attorneys Mary Baker and Franks Sanders initially undertook the defendants' representation. Sanders represented Foose; Baker represented Shattuck and several other defendants. The attorneys hired Albert Rodriguez, a commander with the Texas Department of Public Safety, to consult on the defense and to testify as an expert witness. The findings of attorney misconduct arise from their interaction with Rodriguez, and with defense witnesses whom he was advising.

1.

In January 2004, Rodriguez interviewed Foose, Shattuck, and two other officers who had been present at Shady Park Drive on the date of the Ibarras' arrests. Baker attended this interview, and Sanders may have been in and out.

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[3] The Ibarras named the following defendants: Harris County, Texas; Harris County Sheriff's Department; Harris County Organized Crime Task Force; Sheriff Tommy Thomas; Foose; Shattuck; Deputy Sheriff Manuel Moreno; Sergeant Alexander Rocha; and Deputy John Palermo. The Ibarras' actions, though filed separately, were later consolidated.

Partially on the basis of this interview, Rodriguez prepared a preliminary expert's report describing 2911 Shady Park Drive as being in a "high crime area" and opining that:

> Deputy Foose, as any well trained law enforcement officer, believed that . . . Sean Ibarra was photographing the undercover officers for the purposes of retaliation. Deputy Foose also believed that Sean Ibarra photographing the undercover officers presented a danger to the undercover officers. Deputy Foose believed that reasonable suspicion existed to legally stop and detain Sean Ibarra . . . .
>
> Sean Ibarra's flight confirmed that reasonable suspicion existed to legally stop and detain Sean Ibarra. In my opinion any reasonable and prudent law enforcement officer could have believed that attempting to stop and detain Sean Ibarra was legal, justified, and necessary when presented with the same or similar circumstances.

The terms "high crime area" and "retaliation" would become linchpins of the officers' § 1983 defense. They also would become the focus of the sanctions against Baker and Sanders.

Soon after Rodriguez filed his preliminary report, the Ibarras deposed a series of witnesses: Rodriguez on August 27, 2004; Foose on September 10; Sergeant Alexander Rocha, another defendant who had been present at the scene, on September 13; and Shattuck on September 15. Rodriguez met with each officer, alone, the day or two before the officer's deposition. Rodriguez flew from Austin to Houston to meet with Foose on September 9. He spoke over the phone with Rocha on September 12. He flew from Austin to Houston to meet with Shattuck on September 13.

These one-on-one meetings came to light during the officers' depositions, where the Ibarras voiced concern that Rodriguez had used the meetings to adulterate the officers' testimony. The Ibarras inquired whether Baker or

Sanders had approved the meetings. The answer was yes; Baker (and, in the case of Foose, Sanders) had authorized Rodriguez to contact the officers. The Ibarras' counsel further inquired what had transpired during Rodriguez's face-to-face meetings with Foose and Shattuck.

Foose responded that he and Rodriguez had met over lunch. Rodriguez had given him Rodriguez's copy of the Valdez/Ibarra criminal-trial transcript, which Foose flipped through during the meeting. Rodriguez had highlighted portions of the transcript and written notes in the margins during his own review of it; Foose testified that he saw this markup. He also testified, however, that he and Rodriguez had not discussed the transcript's substance during their meeting.

On further inquiry, Foose recounted that he and Rodriguez had discussed the *Ibarra* litigation—but only in very general terms. He also testified that, during the meeting, Rodriguez had asked him whether Foose knew the definition of reasonable suspicion; Foose testified that he answered by giving a very general definition of that term. The pair possibly had a similarly abstract colloquy about probable cause. Foose denied that he and Rodriguez had gone into detail about how reasonable suspicion or probable cause applied to Sean's seizure or arrest. He also denied that Rodriguez advised him how to testify at the deposition other than to tell the truth.

Events that occurred the next day suggest otherwise. Foose attended his deposition as scheduled, and he brought a page of notes with him to the deposition. These notes outline a key concept for the defense, articulable facts supporting reasonable suspicion to detain Sean. The notes begin with a general definition for reasonable suspicion, and they list eight specific facts giving rise to Foose's reasonable suspicion to detain Sean. The notes also contain a general definition for "Elements of Evade Detention," a Texas crime cited in Rodriguez's preliminary report. Rodriguez's preliminary report lists the same eight facts

supporting reasonable suspicion to detain Sean, in roughly the same order as Foose's notes. Foose testified that he had made the notes by himself after meeting with Rodriguez.

One of the facts listed in Foose's notes was that the events of January 4, 2002, had occurred in a "high crime area." This note was the first time in the § 1983 proceedings or any of the prior criminal proceedings that a defendant referred to 2911 Shady Park Drive as being in a "high crime area." The Ibarras questioned Foose about the address being in a high crime area. He elaborated that he had learned 2911 Shady Park Drive was in a high crime area during a briefing before the officers executed the January 4, 2002, warrant at that address. This testimony was the first time that Foose had mentioned the briefing. The Ibarras pressed for details about the briefing—where it occurred, who gave it, who else was present—but Foose was unable to provide even a single detail.

Further damaging to his testimony, Foose often vacillated and claimed inability to recall important details of his meeting with Rodriguez that, again, had occurred the day prior. The district court later would find that Foose had a "predisposition to recollect facts that support the defense's theory of defense while denying recollection of other key or contradictory evidence."

The Ibarras' counsel later asked Shattuck what had transpired during Shattuck's one-on-one meeting with Rodriguez. Shattuck responded that he had met with Rodriguez over breakfast. Rodriguez asked Shattuck to tell him again what had occurred on January 4, 2002; and whether his recollection had changed since the pair had last spoken on January 15, 2004. Shattuck testified that he and Rodriguez had not talked about Shattuck's upcoming deposition.

After learning the above facts, the Ibarras moved for sanctions. They asserted that Rodriguez had drawn the concepts of "high crime area" and